IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 30, 2002 Session

# M.H. ET AL. v. A.H.

**Appeal from the General Sessions Court for Bradley County**
**No. 8146-J C. Van Deacon, Judge**

**FILED DECEMBER 11, 2002**

**No. E2002-00180-COA-R3-JV**

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Acting on the petition of M.H. and her husband, E. H. ("the petitioners"), the trial court terminated the parental rights of A.H. ("Mother") to J.H. (DOB: January 18, 1998) ("the child"). The court found clear and convincing evidence that "abandonment by [Mother] had occurred as defined in [Tenn. Code Ann.] § 36-1-102"[1] and that termination of Mother's parental rights "would be in the

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[1] Tenn. Code Ann. § 36-1-102 (Supp. 2002) provides, as pertinent to this case, as follows:

> (1)(A) "Abandonment" means, for purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child *in order to make that child available for adoption*, that:
>
> (i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s)...have willfully failed to visit ...;
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> * * *
>
> (C) For purposes of this subdivision (1), "token visitation" means that the visitation, under the circumstances of the individual case, constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child;
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> * * *
>
> (E) For purposes of this subdivision (1), "willfully failed to visit" means the willful failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation;
>
> (F) Abandonment may not be repented of by resuming visitation or support subsequent to the filing of any petition seeking to terminate parental or guardianship rights or seeking the adoption of a child;
>
> * * *

(Emphasis added).

child's best interest." *See* Tenn. Code Ann. § 36-1-113(c) (2001).[2] Mother appeals, contending that the trial court erred in finding that she had abandoned the child. Primarily because we hold that the petitioners lack standing to seek the termination of Mother's parental rights under the applicable statute, we reverse the trial court's judgment.

**Tenn. R. App. P. 3; Judgment of the General Sessions Court Reversed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and HERSCHEL P. FRANKS, J., joined.

D. Michael Bryant, Cleveland, Tennessee, for the appellant, A.H.

Jerry Hoffer, Cleveland, Tennessee, for the appellees, M.H. and E.H..

## OPINION

### I.

Mother was 19 years old and unmarried when she gave birth to the child. In the months following the child's birth, Mother worked two jobs and found it difficult to care for the child. When the child was approximately four months old, in April or May, 1998, Mother began leaving the child in the petitioners' care at their residence. Soon thereafter, he was with the petitioners most

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[2] Tenn. Code Ann. § 36-1-113(c) provides, in pertinent part, as follows:

> (c) Termination of parental or guardianship rights must be based upon:
>
> (1) A finding by the court by clear and convincing evidence that the grounds for termination or parental or guardianship rights have been established; and
>
> (2) That termination of the parent's or guardian's rights is in the best interests of the child.
>
> * * *
>
> (g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:
>
> (1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred.
>
> * * *

of the time. Mother married the child's father ("Father") on August 15, 1998, about seven months after the child's birth.[3] Neither the parents nor the child are related to the petitioners by blood or marriage. Mother was a close friend of the petitioners' daughter and thought of the petitioners as parental figures.

Mother's marriage to Father lasted only about 16 months. In May, 1999, Mother moved into the petitioners' residence. During the time Mother lived with the petitioners, they continued to assume primary responsibility for the child's care. Sometime during Mother's stay with the petitioners, Mother wrote a note to the petitioners in which she expressed a strong inclination to give the petitioners custody of the child. In July, 1999, Mother moved out of the petitioners' home and into an apartment with the petitioners' daughter. The child remained with the petitioners. Mother and Father entered into a Marital Dissolution Agreement on November 12, 1999, and were divorced on December 21, 1999. The divorce judgment granted Mother sole custody of the child. However, the child continued to live with the petitioners.

The petitioners filed the instant petition on January 14, 2000. That same day, the trial court entered an "Emergency Temporary Custody Order," granting the petitioners custody of the child. The petition alleged both abandonment by Mother and that the child was dependent or neglected. The petition further alleged that it was in the child's best interest that Mother's parental rights be terminated.

On January 3, 2002, the trial court granted the petition for termination based upon a finding of abandonment by Mother. The court concluded that termination was in the child's best interest. The trial court premised its finding of abandonment upon the fact that Mother had failed to make frequent and meaningful visits to see the child. The trial court based its conclusion as to the child's best interest upon two grounds: first, because Mother had failed to develop a meaningful relationship with the child, and second, that any change in environment that could occur as a result of not

[3]The parental rights of the child's father, which have been terminated, are not at issue on this appeal.

terminating parental rights would likely have an adverse effect on the child's emotional and psychological well-being. *See* Tenn. Code Ann. § 36-1-113(i) (2001).[4]

From the bench, the trial court acknowledged that opinions varied as to whether termination of Mother's parental rights was appropriate in this case. This is evidenced by the fact that the trial court did not follow the advice of the child's appointed guardian ad litem. The court below commented as follows:

> You know, this is probably the second time in 12 years I've ever gone against the recommendation of the guardian ad litem. But there has been no, what I think, would be a lasting adjustment to establish that kind of relationship necessary for this child to grow up in an appropriate, healthy, wholesome environment.
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> I think for me to change that environment – based upon the testimony and the record here today, I think to do that would be in [the child's] worst interest. And for that reason I'm going to terminate [Mother's] parental rights.

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[4] T.C.A. § 36-1-113(i) provides, in pertinent part, as follows:

> In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:
>
> (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
>
> (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
> (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
>
> (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
>
> (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
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> * * *

II.

We hold that the issue of standing is the critical issue in this case. The subject of standing to bring a petition seeking to terminate an individual's parental rights is addressed in Tenn. Code Ann. § 36-1-113(b) (2001):

> The prospective adoptive parent(s) of the child, any licensed child-placing agency having custody of the child, the child's guardian ad litem, a court appointed special advocate (CASA) agency, or the department [of children's services] shall have standing to file a petition...to terminate parental or guardianship rights of a person alleged to be a parent or guardian....

The above quoted statutory language is part of Tennessee's adoption law. The adoption statutes are in derogation of the common law and must be strictly construed. *See* ***In re K.A.Y.***, 80 S.W.3d 19, 23 (Tenn. Ct. App. 2002). While the petitioners have custody of the child, they do not seek to adopt the child in this proceeding and do not otherwise fit into any of the categories of standing under the statute. Strictly construing this statutory scheme, we hold that Tenn. Code Ann. § 36-1-113(b) is an exclusive list of those individuals and entities with standing to bring an action seeking to terminate parental rights. Since the petitioners do not fall within the language of this statute, they do not have standing to file the petition in the instant case. *See* ***Sorrells v. Sorrells***, No. E1999-01658-COA-R3-CV, 2000 Tenn. App. LEXIS 675, at *9-*10 (Tenn. Ct. App. E.S., filed Oct. 5, 2000) (Susano, J., concurring) (asserting that lack of standing, even if not raised on appeal, is an appropriate ground for reversal in a termination of parental rights case).

This case involves a fundamental right under the United States and Tennessee constitutions. *See* ***Stanley v. Illinois***, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212-13, 31 L. Ed. 2d 551 (1972) (stating that the right to parent arises from federal due process and equal protection); *see also* ***Hawk v. Hawk***, 855 S.W.2d 573, 577 (Tenn. 1993) (stating that under Article I, Section 8 of the Tennessee Constitution, the right to parent lies within the fundamental right to privacy). The following quote from the Court of Appeals of New York is instructive:

> Absent extraordinary circumstances, narrowly categorized, it is not within the power of a court,...to make significant decisions concerning the custody of children, merely because it could make a better decision or disposition. The State is *parens patriae* and always has been, but it has not displaced the parent in right or responsibility. Indeed, the courts and the law would, under existing constitutional principles, be powerless to supplant parents except for grievous cause or necessity.

***Bennett v. Jeffreys***, 40 N.Y.2d 543, 545-46, 387 N.Y.S.2d 821, 824, 356 N.E.2d 277, 281 (1976) *cited with approval in* ***Hawk***, 855 S.W.2d at 581. Implied in this quote is the general principle that

absent specific statutory authority, courts may not terminate parental rights. In addition, such statutory procedures must comport with applicable constitutional protections. The petitioners are asking the courts to strip Mother of a fundamental right. As such, we must be careful to make sure that their petition satisfies *all* of the elements prescribed by the applicable statutes. One of these statutes defines and requires standing as an element. Since the petitioners lack standing, granting their petition would infringe upon Mother's fundamental right to parent her child.

While neither party directly raises this particular issue, Tenn. R. App. P. 13(b) permits us to review certain issues that have not been raised on appeal:

> Review *generally* will extend only to those issues presented for review. The appellate court shall also consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review, and may in its discretion consider other issues in order, among other reasons: (1) to prevent needless litigation, (2) to prevent injury to the interests of the public, and *(3) to prevent prejudice to the judicial process.*

(Emphasis added). Exercising our discretion, we hold that allowing the petitioners to bring this petition when they lack standing would prejudice the judicial process.

III.

While our holding with respect to standing is a sufficient basis to reverse the judgment below, we have considered Mother's issue that there is no clear and convincing evidence to support the trial court's findings in this case. We find that the evidence preponderates against the trial court's dual determinations that there is clear and convincing evidence of a ground for termination and that termination is in the best interest of the child. *See* Tenn. R. App. P. 13(d) (stating that an appellate court may not disturb a trial court's factual determinations unless the evidence preponderates against such findings).

IV.

The judgment of the trial court is reversed. This matter is remanded to the trial court for such further proceedings, if any, as may be necessary. The costs on appeal are taxed to M.H. and E.H.

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CHARLES D. SUSANO, JR., JUDGE